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de Oliveira Mazzuoli, Valerio; Ribeiro, Dilton
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The Japanese Legal System and the *Pro Homine* Principle in Human Rights Treaties*

El sistema jurídico japonés y el principio pro homine *en los tratados sobre derechos humanos*

Valerio **de Oliveira Mazzuoli****
Dilton **Ribeiro*****

SUMARIO: I. *Introduction*. II. *International Law and the Conflict of Norms*. III. *Japan's Legal System and International Human Rights Treaties*. IV. *The* Pro Homine *Principle*. V. *Feasibility of the* Pro Homine *Principle in Japanese Law*. VI. *Conclusion*. VII. *Bibliography*.

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** International Law and Human Rights Professor (Federal University of Mato Grosso, Brazil), Postdoctoral Fellow in Law and Political Sciences (University of Lisbon, Portugal), PhD *summa cum laude* in International Law (Federal University of Rio Grande do Sul, Brazil), LLM (São Paulo State University, Brazil). *E-mail*: mazzuoli@ufmt.br.

*** PhD Candidate (Queen's University, Canada), LLM (University of Manitoba, Canada), LLB (Southwest Bahia State University, Brazil). *E-mail*: 11drfr@queensu.ca.

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ABSTRACT: The objective and purpose of international human rights is the protection of the human person. Individuals are the primary concern and addressees of human rights norms and principles. Accordingly, all human rights instruments seek the best possible protection for the human person. This theory, which underpins the entire human rights system, is called the *pro homine* principle. In our view, this *pro homine* framework of international law was fully accepted by the Japanese Constitution through its Article 11. It forbids restrictive interpretation of rights —limitation of rights must be restrictively interpreted— and it can be a guideline to analyze omissions in human rights norms. Accordingly, Article 11 fits all the criteria of the pro homine principle by crystalizing a true public order which prioritizes the human person setting the parameters to interpret and apply human rights norms. Consequently, this provision allows a "dialogue of sources" seeking the best norm which could better protect individuals in a specific situation regardless of its international or domestic status or hierarchy.
Key words: international human rights, treaties, comparative law, Japanese constitutional law.

RESUMEN: El objetivo y propósito de los derechos humanos internacionales es la protección de la persona humana. Los individuos son la principal preocupación y destinatarios de las normas y principios de derechos humanos. Esta teoría, que apuntala el sistema completo de derechos humanos, es llamada principio *pro homine*. En nuestra perspectiva, este marco *pro homine* de derecho internacional fue completamente aceptado por la Constitución Japonesa a través de su artículo 11. Este prohíbe una interpretación restrictiva de los derechos —los límites a los derechos deben interpretarse restrictivamente— y puede ser una guía para analizar las omisiones en normas de derechos humanos. Concordantemente, el artículo 11 llena todos los criterios del principio *pro homine* al cristalizar un verdadero orden público que prioriza a la persona humana al establecer los parámetros de interpretación y aplicación de las normas de derechos humanos. En consecuencia, este artículo permite un "diálogo de fuentes" buscando la norma que mejor pueda proteger a los individuos en situaciones específicas sin importar su estatus o jerarquía internacional o doméstico.
Palabras clave: derechos humanos internacionales, tratados, derecho comparado, derecho constitucional japonés.

RÉSUMÉ: L'objectif et le propos des droits de l'homme internationaux est la protection de la personne humaine. Les individus sont la première préoccupation et destinataires des normes et des principes des droits de l'homme. En conséquence, tous les instruments des droits de l'homme cherchent la meilleure protection pour la personne humaine. Cette théorie, qui soutient entièrement le système des droits de l'homme, est appelée principe *pro homine*. À notre avis, ce cadre de droit international *pro homine* a été complétement accepté par la Constitution japonaise dans son article 11, lequel interdit une interprétation restrictive des droits —les limitations des droits doivent être interprétées restrictivement— et celui-ci peut être un guide pour analyser les omissions des normes des droits de l'homme. En conséquence, cette provision permet un "dialogue de source" en cherchant la meilleure norme qui peut mieux protéger les individus dans une situation spécifique sans importer leur statut national ou international ou leur hiérarchie.
Mots-clés: droits de l'homme internationaux, traités, droit comparé, droit constitutionnel japonais

I. Introduction

States are the primary subjects of international law and treaties are the main instruments to establish detailed legal obligations at the international level. Consequently, treaties are envisaged to be legally effective at the international and municipal spheres.[1] At the domestic level, with incorporate methods varying from country to country, treaties must be integrated into the State's legal system. Scholars and lawyers face the question of how these treaties are incorporated and with which *status* they enter a State's domestic legal structure. This question is particularly topical in the area of human rights which is ultimately concerned not with State interests but with the protection of the human person. In other words, this topic is relevant to human rights treaties because they concern individuals' rights and not only the regulation of the relation between States, as it is the case of traditional treaties.

The traditional practice of States is to select a moderate form of monism or dualism to acknowledge that treaties remain treaties when they are ratified or, rather, they need to be transformed into a domestic legislation to be valid under municipal law.[2] These traditional approaches normally result in the acknowledgment that treaties, including human rights treaties, have a hierarchy similar to that of a statute or have infra-constitutional *status*. However, these views might not present the best approach in the area of human rights. In human rights, the interpretative guide should promote the protection of the human person as the final objective and purpose.

Accordingly, the *pro homine* principle was developed as an interpretative guide to orient lawyers, law-makers and judges when interpreting and applying human rights norms. This principle crystalizes a "dialogical monism" by informing that whenever there is a conflict of norms, the one which better protects the human person must be applied. Consequently, it is not based on the hierarchical approach of the traditional monist or dualist theory.[3]

[1] See generally *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331, especially articles 26 and 27.

[2] See generally J. C. Starke, "Monism and Dualism in the Theory of International Law", 17 *British Yearbook of International Law*, 1936, p. 66.

[3] See V. Mazzuoli, "Internationalist Dialogical Monism", 324 *Consulex*, 2010, p. 50 [Mazzuoli, "Dialogical"].

We seek to demonstrate that the *pro homine* principle is an intrinsic element of international human rights law. Furthermore, it could also be part of Japanese constitutional law, which is still a fairly unknown legal system to the Western world in general. The *pro homine* principle, which acknowledges the coexistence of both international and domestic norms, aims to achieve two different but interconnected goals: solving conflicts between municipal norms and international human rights treaties, and supporting the ultimate objective of human rights which is the protection of the human person.

In the first part of the article, we focus on the theoretical elements of the traditional dualist and monist theories and on their variations adopted by some States. The second part of the article focuses on the Japanese approach to the hierarchy of human rights treaties and its traditional method of solving conflicts between these international instruments and municipal norms. The third part concerns the *pro homine* principle and its international development. The final part of the article focuses on the viability of the *pro homine* application in the Japanese legal system.

This paper, thus, aims to introduce a novel debate concerning the incipient theory of the "dialogical monism" in the East Asian context within the Japanese framework. It is not our intent to focus on a detailed analysis of the Japanese constitutional system concerning international treaties.[4] Our goal is, in many ways, more modest. We want to explain the source of the *pro homine* view within the law of nations and highlight a possible link between this international human rights framework and Japanese law based on a comparative analysis. This paper is important for two reasons. First, it stimulates, for the first time, a debate about the *pro homine* principle in the East Asian context. Second, Japan, especially after the Second World War, seeks to embrace international human rights law, which, in many ways, arguably assists shaping Japanese law.[5] We will, however, leave for a further

[4] For a historical approach on the establishment of the modern Japanese Constitution see: K. Shoichi, *The Birth of Japan's Postwar Constitution*, New York, Perseus, 1998.

[5] Port, K. L., "The Japanese International Law 'Revolution': International Human Rights Law and its Impact in Japan", 28 *Stanford Journal of International Law*, 1992, pp. 139-142 and 152-154. Port affirms that Japan's "accession to international human rights treaties since 1979, and in particular its ratification of the Social Rights Covenant, has profoundly influenced Japanese law. These developments have led to the adoption of laws supporting the rights of women and minorities, among other beneficiaries, *ibidem*, pp. 156-157. See also

study the analysis whether this *pro homine* principle or dialogical monism could indeed be applied by Japanese courts.[6]

II. International Law and the Conflict of Norms

States are usually not isolated, but rather they are effective participants of the international society. In other words, as the primary subjects of international law, States engage in a variety of interactions with other States and

Y. Iwasawa, *International law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law*, New York, Clarendon Press, 1998; R. Goodman and I. Neary (eds.), *Case Studies on Human Rights in Japan*, Oxford, Routledge, 1996; and I. Neary, *Human Rights in Japan, South Korea and Taiwan*, New York, Routledge, 2002.

[6] See generally N. L. Nathanson, "Human Rights in Japan through the Looking-Glass of Supreme Court Opinions", 11 *Howard Law Journal*, 1965, p. 316. For a deep analysis of domestic and international human rights, including domestic case laws concerning Koreans in Japan, see Y. Iwasawa, "Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law", *8 Human Rights Quarterly*, 1986, p. 131. Port asserts that "Japanese courts usually interpret and apply treaties directly without questioning whether or not they are self-executing", however they "appear to require implementing legislation only for treaties that directly State their non-self-executing status". See Port, *supra* n. 5, pp. 153-154. For a general view on the role of the Japanese Supreme Court in shaping the State's legal system and its power of judicial review, see S. Matsui, "Why Is the Japanese Supreme Court so Conservative?", 88 *Washington University Law Review*, 2011, p. 1375. For a different view from Professor Matshui's, see: C. Martin, "The Japanese Constitution as Law and the Legitimacy of the Supreme Court's Constitutional Decisions: A Response to Matsui", 88 *Washington University Law Review*, 2011, p. 1527. See also D. S. Law, "Why Has Judicial Review Failed in Japan", 88 *Washington University Law Review*, 2011, p. 1425. It is, moreover, important to highlight that Japanese courts are not in harmony, that is to say, have controversial interpretations regarding the text of Article 11 of the Constitution. In *McLean* v, *Minister of Justice*, for example, In McLean v Minister of Justice, an American citizen who went to Japan as a teacher had his visa renewal request denied by the Minister of Justice on the grounds that although he engaged in anti-Vietman War activities within the scope of protection of the freedom of expression clause of the Japanese Constitution, they were not helpful to Japan. This view was upheld by the Supreme Court on the grounds that the Minister has discretion to decide (See Supreme Court of Japan, 4 October 1978, Case No. 1975 (Gyo-Tsu) No 120, *McLean* v. *Minister of Justice*). In another case, Supreme Court decided on the constitutionality of the foreign resident registration system arguing that since foreigners were not part of the Family Register, another system for them would be permitted (See Supreme Court of Japan, 17 November 1997, 51 Keishu 10-855, *Foreign Resident Registration System Constitutional Case*).

the international society as a whole. They, not unusually through the conclusion of treaties,[7] establish a legal matrix that guide and crystalize parameters for their actions at the international level. Furthermore, especially after the Second World War, the international society sought to crystalize an ethical standard as part of international law rooted on human rights.

The Universal Declaration of Human Rights, for example, sets some basic premises for the development of a new framework for international human rights law: inherent dignity, and equal and inalienable rights as international concerns; essential freedoms such as freedom of speech and belief, and freedom from fear; the existence of a conscience of mankind; the rule of law; friendly relations between nations; the existence of basic fundamental human rights enshrined in the Charter of the United Nations; a common standard of achievement for all peoples and all nations; and the existence of national and international fundamental rights concerning peoples of member-States themselves and peoples of territories under their jurisdiction.[8] In our view, these principles, recognized by States themselves, were followed and "translated into a juridical reality" by international treaties, which sought to crystalize rights and duties protecting the human person as the object and purpose of international human rights law.

The proliferation of treaties leads to the question of the relationship between international law and domestic law. In human rights, this question is particularly pertinent because human rights treaties are not focused on State interests, but concern the protection of the human person, the main

[7] Kearney and Dalton, for example, affirm that treaties are an "indispensable element in the conduct of foreign affairs", adding that without this mechanism "international intercourse could not exist, much less function". See R. D. Kearney & R. E. Dalton, "The Treaty on Treaties", 64 *The American Journal of International Law*, 1970, p. 495.

[8] *Universal Declaration of Human Rights,* G.A. Res. 217 (III), U.N. G.A.AOR, 3d Sess., Supp. nº 13, U.N. Doc. A\810 (1948) at preamble. Although a controversial topic, in our view, the Universal Declaration of Human Rights could be envisaged as a binding instrument. See M. Shaw, *International Law* (New York, Cambridge University Press 2003) p. 260. See also J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia, University of Pennsylvania Press, 1999; E. D. Re, "The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts", 33 *California Western International Law Journal*, 2003, p. 137 and p. 140; Glendon, M. A., "Knowing the Universal Declaration of Human Rights", 73 *Notre Dame Law Review*, 1998, p. 1153; Dicke, K., "The Founding Function of Human Dignity in the Universal Declaration of Human Rights", in Kretzmer, D. and Klein, E. (eds.), *The Concept of Human Dignity in Human Rights Discourse*, New York, Kluwer Law International, 2002.

addressee of their provisions. In other words, international human rights treaties, by protecting the *human person* instead of solely regulating *inter-State* relations, break with the Westphalian paradigm. As part of a recent development of international law, one can notice that States constantly ratify treaties, including human rights treaties which, after following international and constitutional patterns of approval, are, at least theoretically, in force and binding. Accordingly, international adjudication bodies as, for example, the Inter-American Court of Human Rights[9] or the European Court of Human Rights[10] apply their respective constitutive treaty: the American Convention on Human Rights (1969)[11] and the European Convention on Human Rights (1950).[12]

Furthermore, once a treaty is ratified and approved following the rules set by international law[13] and municipal law, the question regarding the *status* or domestic validity of international treaties emerges, especially in the area of human rights. It is usually the municipal law of each State which regulates the domestic *status* of treaties and how to solve conflicts between the treaties and the domestic norms.[14] Constitutions generally establish the rules of treaty-making power and sometimes regulate the relation between treaties and the internal norms.

Normally, the States' constitutional systems adopt a dualist or monist concept. The dualist theory is rooted in the existence of two different legal systems —domestic and international— which are different, independent, and without any connection or conflicts between them. Accordingly, treaty rights and obligations can only have effect domestically when they are incorporated by municipal legislation.[15] That is, for example, the case of the

[9] *American Convention on Human Rights*, 1144 United Nations Treaty Series, p. 123, Organization of American States Treaty Series, nº 36, Chapter VIII [hereinafter "Inter-American Court of Human Rights" or "Inter-American Court" or "Court"].

[10] *Original Version of the Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 United Nations Treaty Series, nº 221, p. 223, 5 European Treaty Series, Article 19 [hereinafter "European Court of Human Rights" or "European Court"].

[11] *American Convention on Human Rights*, *supra* n. 9.

[12] *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* n. 10.

[13] See *Vienna Convention on the Law of Treaties*, *supra* n. 1.

[14] See generally Shaw, *supra* n. 8, pp. 138-179.

[15] A. Aust, *Handbook of International Law*, New York, Cambridge University Press, 2005, pp. 187-188. See also I. Brownlie, *Principles of Public International Law*, New York, Oxford, 2003, pp. 44-45.

Canadian system where treaties are transformed into municipal law and implemented by statute.[16] Freeman and Ert affirm that "[t]he general rule, therefore, is that treaties are not part of the Canadian law unless they have been implemented by statute".[17] As a general rule, in such legal systems, treaties commonly have the same legal *status* of a statute or infra-constitutional legislation. In other words, the dualist system "avoids any question of the supremacy of one system of law over the other, as they share no common field of application, each being supreme in its own sphere".[18] The dualist system is not an exclusively Canadian theory, is adopted by the United States, England and, to a lesser extent, the Scandinavian countries.[19]

Some States accept the monist theory, which conveys the idea that there is one single legal system including international and domestic laws.[20] Thus, there is no need to transform a treaty into a domestic legislation to incorporate it into the municipal legal.[21] In other words, treaties are self-executing. Article 96 of the Spanish Constitution of 1978, for example, provides that "the international treaties as soon as officially published in Spain are part of the Spanish internal order".[22] Article 25 of the Federal Constitution of Germany (*Grundgesetz*) stipulates that "the general norms of public international law are part of the federal law"[23] and, furthermore, "they overlap the laws and they constitute direct source to the inhabitants of the national territory".[24] The Constitution of Italy, in Article 10, provides

[16] Freeman, M. & van Ert, G., *International Human Rights Law*, Toronto, Irwin Law Inc, 2004, p. 164

[17] *Ibidem*, pp. 164-165.

[18] Slyz, G., "International Law in National Courts", 28 *New York University Journal of International Law & Politics*, 1996, p. 68.

[19] See Burgenthal, T., "Modern Constitutions and Human Rights Treaties" 36 *Columbia Journal of Transnational Law*, 1998, p. 213.

[20] Mazzuoli, V., *Direito dos Tratados* [Law of Treaties] (São Paulo, Editora Revista dos Tribunais 2011) pp. 389-416 and 215 [Mazzuoli, *Law of Treaties*].

[21] Currie, J. H. *et al.*, *International Law: Doctrine, Practice, and Theory*, Toronto, Irwin Law Inc, 2007, p. 104.

[22] Spain, Congreso, *Constitución Española of 1978* [Spanish Constitution of 1978], Article 96, n.1 [translated by author], *www.congreso.es/consti/*. Accessed on 18 December 2013.

[23] Germany, Deutscher Bundestag, *Grundgesetz of 1949* [Basic Law of 1949], Article 25 [translated by author], *www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/*. Accessed on 18 December 2013.

[24] *Idem*.

that "the Italian juridical order confirms with the international norms generally recognized".[25] The monist theory is a practical doctrine because, as pointed out, it does not require the conversion of a treaty into domestic legislation which would demand extra time and political effort. Furthermore, an international treaty, especially in human rights, is already suited to domestically bind States, that is, they establish clear obligations to States and benefit individuals.

However, in the monist spectrum, States have to decide on the solution of conflicts between treaties and domestic laws. Traditionally, they could follow the dualist approach and decide conflicts based on the maxims that newer law overrides an older law or that a special law overrides a general law. Furthermore, States could also give priority to a treaty or a domestic law.[26] In the case of the protection of the individuals, human rights treaties could have priority over domestic laws and be part of the domestic legal system bellow the Constitution but above infra-constitutional law, or become an integral part of the Constitution's bill of rights or, moreover, could arguably even be above the Constitution.[27]

Accordingly, following these rules of conflict resolution, a treaty can have the same hierarchy of a domestic law if it is "transformed" into an act based on the dualist approach or if it is accepted with *status* of a statute in the monist system. Once adapted, the treaty will override any act in force contrary to it. However, a newer domestic legislation could supersede a conflicting older treaty which was in force when it was adopted. Similarly, treaties, which tend to regulate specific situations, could overrule a general domestic statute on specific provisions. Conversely, applying the same *lex specialis* reasoning, a domestic norm dealing with a specific matter can supersede a general treaty.

[25] Italy, Governo Italiano: Presidenza del Consiglio dei Ministri, *Costituzione della Repubblica Italiana of 1948* [Constitution of the Italian Republic of 1948], Article 10 (1) [translated by author], *governo.it/Governo/Costituzione/principi.html*. Accessed on 18 December 2013.

[26] V. Mazzuoli, *Curso de Direito Internacional Público* [Public International Law], São Paulo, Revista dos Tribunais, 2013, pp. 104-111 [Mazzuoli, *Curso*].

[27] For a well-written approach on treaty implementation see T. Buergenthal, *supra* n. 19. See also L. Henkin, "International Law: Politics, Values and Functions" 216 *Recueil des Cours* (1989); and T. Burgenthal, "Domestic Status of the European Convention on Human Rights" 13 *Buffalo Law Review* (1964).

The "parity rule" or the "special/general" rule could work to solve conflicts between treaties and domestic laws. However, they can nevertheless lead to certain legal uncertainty. The international society and international courts cannot be sure if a treaty will indeed be in force inside State boundaries. Perhaps based on this consideration, the Vienna Convention on the Law of Treaties establishes that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[28] If a treaty is not denounced at the international level —which might only "take place only as a result of the application of the provisions of the treaty or of the present Convention"—[29] it remains valid and States must, based on the *pacta sunt servanda*,[30] follow its provisions.

This traditional approach, therefore, might lead to a situation in which a State removes the treaty domestically but is still bound to comply with it internationally if it is not properly denounced. Based on the general rules of the Vienna Convention on the Law of Treaties, this State, for example, might be forced by international courts to domestically comply with this municipally removed treaty. Moreover, human rights courts might decide that a State had breached a specific human rights treaty and determine certain changes in this State's domestic laws regardless of the fact that this treaty might not be domestically applicable due to a newer legislation of equal *status* (in a monist system) or to a lack of willingness to transform this human rights treaty into a domestic statute (in a dualistic State).

This traditional monist and dualist approaches are not suited to explain and accommodate the contemporary practice of international law. International agreements, in European Union law, as Gonenc and Esen points out, are "superior to national laws and directly applicable".[31] Furthermore, the Inter-American Court of Human Rights, for example, uses the American Convention on Human Rights as the standard instrument to determine changes in domestic law or demand that States act of refrain from acting in certain ways or towards certain individuals.[32]

[28] V*ienna Convention on the Law of Treaties*, *supra* n. 1, Article 27.

[29] *Ibidem*, Article 42 (2).

[30] *Ibidem*, Article 26, which spells out that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

[31] Gonenc, L. & Esen, S., "The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution", 8 *European Journal Law Reform* (2006), n. 4.

[32] See generally IACtHR (Judgment) 31 August 2001, *Case of Mayagna (Sumo) Awas Tingni*

The monist theory, besides its nationalist branch which advocates the superiority of domestic laws,[33] has an internationalist approach. The internationalist division of the monist theory allocates prominence to international law over municipal law. In other words, in case of conflict between a treaty and a domestic law, the international instrument prevails. Based on the internationalist monism, even if a statute is newer or more specific than a treaty, it will not possess an overriding *status*. The French Constitution, for example, informs that "treaties or agreements duly ratified or approved have, upon publication, a higher authority than the laws, subject, for each agreement or treaty, to its application by the other party".[34] In similar terms, the Estonian provides that "[i]f laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply".[35]

Some States, therefore, adopt a specific variation of the monist theory which grants special *status* to international treaties. However, should human rights treaties always prevail when in conflict with domestic laws? Moreover, should a human rights treaty be part of the Constitution's bill of rights? A new modified version of Article 90 of the Turkish Constitution provides that when there is conflict "between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provisions of international agreements shall be considered".[36] The Turkish Constitution provides supremacy to human rights treaties over domestic law but

Community v. *Nicaragua*, para. 2; IACtHR (Judgment) 17 June 2005, *Case of Yakye Indigenous Community* v. *Paraguay*, p. 2, para. 2; G. Donoso, "Inter-American Court of Human Rights' Reparation Judgments: Strengths and Challenges for a Comprehensive Approach", 49 *Revista IIDH* (2009); IACtHR (Reparations and Costs) 10 September 1993, *Aloeboetoe et al case* v. *Suriname* ; IACtHR (Judgment) 19 November 1999, *"Street Children" Case Villagrán-Morales et al* v. *Guatemala*; and IACtHR (Judgment) 29 March 2006, *Sawhoyamaxa Indigenous Community* v. *Paraguay*, para. 140.

[33] Mazzuoli, *Curso*, *supra* n. 24, p. 96.

[34] France, Assemblée Nationale, *Constitution de la République Française* [Constitution of the French Republic], Article 55, *www.assemblee-nationale.fr/connaissance/constitution.asp*. Accessed on 19 December 2013.

[35] Estonia, President, *Constitution of the Republic of Estonia*, Article 123, *www.president.ee/en/republic-of-estonia/the-constitution/*. Accessed on 19 December 2013.

[36] Tukey, The Grand National Assembly of Turkey, Constitution, *Constitution of Turkey*, Article 90 (5), *global.tbmm.gov.tr/docs/constitution_en.pdf*. Accessed on 19 December 2013.

it does not mention if the Constitution would prevail in case of conflict with an international instrument. The Argentine Constitution, following the American Constitution to the letter, establishes that "the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation".[37] Moreover, it grants constitutional hierarchy to certain human rights instruments as, for example, the American Declaration on the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and, furthermore, establishes that other human rights treaties could attain constitutional hierarchy with "the vote of two-thirds of all the members of each House, after their approval by Congress".[38]

A modified Article 5 of the Brazilian Constitution spells out that "[i]nternational human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments".[39] Before this new Article 5 from 2004, Brazil ratified the American Convention without reservations in 1992.[40] Brazilian judges had to solve the problem of conflicts between the American Convention's provision, which forbids detention for debt,[41] and Brazilian norms envisaging the possibility of the civil arrest of the *depositário infiel* ("unfaithful deposi-

[37] Argentina, Senado de la Nación Argentina, Institucional: *Constitución Nacional* [National Constitution], Section 31, *www.senado.gov.ar/deInteres*. Accessed on 19 December 2013.

[38] *Ibid.* Section 75 (22). See also Georgetown University, Political Database of the Americas, Republic of Argentina: *1994 Constitution,* Section 75 (22), *pdba.georgetown.edu/constitutions/argentina/argentina.html*. Accessed on 19 December 2013.

[39] Brazil, Supremo Tribunal Federal, About the Court: Brazilian Constitution, *Constitution of the Federal Republic of Brazil*, Article 5 (4) (Constitutional Amendment 45), www2.*stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120010*. Accessed on 19 December 2013.

[40] See Inter-American Commission on Human Rights, Basic Documents Pertaining to Human Rights in the Inter-American System, *American Convention on Human Rights (Pact of San Jose, Costa Rica)*, *www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm#16*. Accessed on 9 December 2013.

[41] *The American Convention on Human Rights, supra* n. 9, Article 7 (7). The only exception when a competent judicial authority issues an arrest warrant for non-fulfillment of duties of support.

tary"). *Depositário*, under Brazilian law, is a person designated by contract or by a competent judge to take care with due diligence of a certain object.[42] *Infidelidade*[43] is when this person does not take proper care of the object and might consequently be arrested. This norm, therefore, directly conflicts with the American Convention. The Brazilian Supreme Court,[44] in December 2008, decided that the American Convention entered domestic law with a hierarchy *superior* to domestic acts and legislation, but *inferior* to the Federal Constitution.[45] Thus, the American Convention has superior hierarchy to any infra-constitutional norm and prevails in the case of conflicts.[46] However, the Supreme Court, in our view, was still unclear on the question of conflicts between human rights treaties and the Constitution.

Consequently, States and their legal systems eventually face the question of conflicts between domestic laws, including the Constitution, and international treaties. In the area of human rights, this question could be particularly important because they concern the protection of the human person. Constitutions of democratic societies are based on the crystallization of basic human rights. Furthermore, these Constitutions inform that States must act and interpret their laws based on the existence of fundamental rights and freedoms. In other words, Constitutions and, following their lead, municipal laws in general are structured and construed based on human rights. However, this same rule applies to international human rights treaties. They exist to protect the human rights and set duties and limitations on States.

The relationship between national Constitutions and international treaties, especially human rights treaties, can be ambiguous and uncertain. As previously mentioned, the Argentine Constitution grants constitutional

[42] Mendes, G. F. & Branco, P. G. G., *Curso de Direito Constitucional* [Constitutional Law], São Paulo, Saraiva 2011, p. 639-648; and Mazzuoli, V., *Prisão Civil por Dívida e o Pacto de San José da Costa Rica* [Civil Arrest for Debt and the Pact of San José of Costa Rica], São Paulo, Forense, 2002.

[43] "Infidelity".

[44] Supremo Tribunal Federal (STF).

[45] See Brazil, *Supremo Tribunal Federal*, Recurso Extraordinário 466343/São Paulo.

[46] Mazzuoli, V., *Direitos humanos, Constituição e os Tratados Internacionais: Estudo Analítico da Situação e Aplicação do Tratado na Ordem Jurídica Brasileira* [Human Rights, Constitution and International Treaties: Analitical Study of the Situation and the Application of Treaties in the Brazilian Legal Order], São Paulo, Juarez de Oliveira, 2002, pp. 272-286 [Mazzuoli, *Direitos Humanos*].

status to certain human rights treaties.[47] The Brazilian Constitution, following a similar reasoning, establishes that human rights treaties can have constitutional hierarchy if approved following the constitutional formula.[48] Similarly but not constrained to human rights only, the Constitution of Netherlands establishes that "[a]ny provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour".[49]

Accordingly, the relationship between treaties, especially human rights agreements, and municipal laws, especially Constitutions, is unclear and ambiguous. States have different approaches on this matter and none of these methods are effective and in accordance with the basic purpose of human rights which is the protection of the human person. In this paper we hope to demonstrate that human rights are primarily focused on the human person and this basic premise must guide the municipal internalization of international human rights.[50] An effective method, thus, is the one that better incorporates the centrality of the human person. Furthermore, Japan also faces similar questions relating to the domestic incorporation of international human rights treaties. Consequently, we now turn to the Japanese approach to conflicts between human rights treaties and domestic laws and, furthermore, on the *status* of international human rights instruments domestically.

III. Japan's Legal System and International Human Rights Treaties

Japan is one of the monist countries,[51] which means, as previously explained, that treaties are incorporated into the domestic legal order with-

[47] Georgetown University, *1994 Constitution*, *supra* n. 38, Section 75 (22).

[48] *Constitution of the Federal Republic of Brazil*, *supra* n. 39, Article 5 (4) (Constitutional Amendment 45).

[49] Netherlands, *Constitution of the Kingdom of the Netherlands*, Article 91 (3), *legislationline.org/documents/section/constitutions/country/12*. Accessed on 17 October 2013.

[50] See below.

[51] Sloss, D., "Domestic Application of Treaties", *Santa Clara Law Digital Commons*, Faculty

out the need for any legislative "act" or "instrument" other than the act authorizing the executive to conclude the treaty. One must turn to the Constitution of Japan in order to seek some understanding of the relation between treaties and domestic law.

Article 98(2) of the Constitution of Japan provides that "treaties concluded by Japan and established laws of nations shall be faithfully observed".[52] This article expresses the basic characteristics of Japan's approach to international relations, which is international cooperation and pursuit of world peace. It means that Japan makes a commitment to the international society to build a world where human rights and democracy are respected. This article is said to have two meanings: (1) a political and moral meaning; and (2) a legal meaning.

The first meaning is political and moral. Article 98 seeks to make it clear that the law of nations is an indispensable part of international relations, that is, Japan will not undermine international law.[53] The legal meaning crystalizes the duty to observe international norms. It means that when Japan concludes and promulgates treaties, the government and nationals will be bound by them and courts should apply these international agreements, independently of the need of a new domestic act capable of providing "effectiveness" or "executing status" to this treaty within the Japanese legal system. Moreover, generally established international norms fall under the same category as treaties unless these are special international agreements contrary to them.[54]

Accordingly, the expression "established law of nations" includes treaties and customary international law. As mentioned before, Japan is one of the monist countries. Article 98(2) of Constitution mentions the law of nations as part of the law of the land and, consequently, they enter the domestic legal system without the need of special legislative procedures.[55] Furthermore, there is not a clear answer regarding conflicts between domestic law

Publications, 2011, p. 3: *digitalcommons.law.scu.edu/facpubs/635*. Accessed on 19 December 2013.

[52] Japan, Prime Minister of Japan and his Cabinet, *The Constitution of Japan*, Article 98 (2), *www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html*. Accessed on 10 December 2013.

[53] Sato, I., *Poketto Chūshaku Zensho Kenpō* [Pocket Constitution Annotations Complete Book] (Tokyo, Yuhikaku 1984) pp. 1287-1288.

[54] *Ibidem*, p. 1288.

[55] See Yamamoto, S., *Kokusai-hō* [International Law], Tokyo, Yuhikaku, 1999, pp. 65-84.

and the "established law of nations". Although it is commonly assumed that in the case of conflicts treaties can override infra-constitutional norms, there is no clear answer on conflicts between the "established law of nations" and the Constitution. One could say that treaties override the Constitution, or, take a different path and argue on the contrary. In addition, jurists, following a different line, could argue in favour of an equality *status* between treaties and the Constitution.

Scholars who argue that treaties override the Constitution have mainly three reasons based on the wordings of the Constitution.[56] First, one could assert that Article 98(1) of the Constitution when informing that Constitution is the supreme law of the nation excludes "treaties" from the enumeration. In addition, Article 98(2) provides that the "established law of nations" should be faithfully observed. Second, Article 81 of the Constitution excludes treaties from judicial review. Finally, the preamble of the Constitution and its Article 9 consistently express the principle of international cooperation.[57]

On the other hand, scholars who argue that the Constitution can override treaties have three counterarguments.[58] First, one could argue that Article 98(1) of Constitution provides the supremacy of Constitution over domestic laws only. It would be, thus, natural not to mention treaties. Furthermore, Article 98(2) emphasizes Japan's cooperative attitude at the international level but it does not mean that the country should observe treaties which are unconstitutional. Second, it would be possible to assert that the Constitution excludes treaties from judicial review because they are agreements between nations and are not *prima facie* domestic law. Moreover, it could be argued that the Constitution does not necessarily exclude the possibility of judicial review of international treaties. In addition, the right of judicial review is not directly related to the formal effectiveness of treaties and the Constitution. Third, although the Japanese Constitution adopts the principle of international cooperation, it does not necessarily flow from this fact that this principle grounds the hierarchical superiority of treaties over the Constitution. The argument is that if the Constitution admits that treaties could eventually override it, they would be able

[56] *Ibid*. See also M. Saito, *Kokuhō Taikei ni Okeru Kenpō to Jōyaku* [The Conventional Constitutional System and the Law of the Land] (Tokyo, Shinzansha 2002).

[57] *Idem*.

[58] *Idem*.

to amend it through an easier procedure than the regular constitutional amendment process established by the Constitution itself. This would arguably undermine the principle of popular sovereignty.[59]

Consequently, the majority of Japanese constitutional scholars seem to adopt the position that the Constitution overrides treaties. However, on the other hand, the governmental view is that the general rule that treaties usually cannot override the Constitution should not unlimited. Depending on the content of treaties, one could distinguish which should be prioritized.[60] This view, thus, could be in accordance with the *pro homine* principle applicable in the Japanese context.[61]

The Japanese Constitution arguably includes international human rights within its bill of rights.[62] This notion is especially enshrined in its Articles 11 and 97. Taking into account the principle of international cooperation, provided in Article 98(2) of the Constitution, it is commonly believed that international human rights treaties have direct domestic effect without the requirement of any special procedure. International human rights treaties and the Constitution of Japan have similar, if not equal, concerns and both focus on the protection of the human person based on the recognition of certain basic rights and duties which belong to every human being. However, adjustments would be necessary if there are some gaps in range and degree of rights.

Compared to the Constitution of Japan, international human rights treaties reflect the changes of the international society and developments of the global understanding of human dignity. In other words, these treaties move away from the Westphalian paradigm (which crystalized the notion that the law of nations is set from State to State) to place upon the human person the *status* of subjects of public international law. Accordingly,

[59] *Idem*.

[60] Saito, *supra* n. 56, p. 47.

[61] As it stands, the jurisprudential position, however, is that the Constitution is superior to international treaties in the Japanese legal system. In *Sunagawa*, for example, the Supreme Court decided that the constitutionality of the Japan–United States Security Treaty and the stationing of US military forces in Japan is a political issue which is, consequently, outside the scope of the Court unless they expressly violate the Constitution. See Supreme Court of Japan, 16 December 1960, 13 KEISHO 3225, *Japan* v. *Sakata (Sunagawa Case)*.

[62] Port affirms that Japanese scholars and courts take the view that the Constitution grants treaties the force of law. Consequently, "Japan's courts have proven extremely receptive to giving the norms of international law domestic legal effect". See Port, *supra* n. 5, pp. 153-154.

they can include broader rights which are not explicitly guaranteed by the Constitution. When international human rights treaties recognize broader rights, it works as an expansion of the domestic human rights system. Conversely, when international human rights treaties limit the protection of human right in Constitution of Japan (like in the case of hate speech), it is desirable to reconcile them although the task has been difficult.[63]

Consequently, there is yet no clear answer regarding conflicts between domestic law and international human rights treaties in the Japanese legal system. Although it is fairly accepted that human rights norms are superior to the infra-constitutional ones, there is no clear answer on the case of conflicts between human rights treaties and the Constitution. Even if the Constitution or a Supreme Court establishes a clear answer and places one instrument as the most superior, there is no guarantee that this *status* would in fact prove to be the best system to protect the human person, the final addressee and purpose of human rights norms. Moreover, there is no guarantee that international treaties could prove more protective of individuals' rights than infra-constitutional norms. We could name, for example, the freedom of expression. The International Covenant on Civil and Political Rights establishes that this right could be limited if restricted by law to respect the right of others or to "the protection of national security or of public order (ordre public), or of public health or morals".[64] The Japanese Constitution, by its turn, does not envisage any constitutional restriction on the freedom of expression only informing that"[n]o censorship shall be maintained".[65] One arguably faces two different conceptions of freedom of expression:[66] one with an intrinsic limitation and another one without it. Moreover, the government of Japan can ratify human rights treaties

[63] Tonami, K., *Kenpō* [Constitutional Law], Tokyo, Gyosei, 1998, pp. 119-120.

[64] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *United Nations Treaty Series* 171, Article 19 (a), (b) [hereinafter "International Covenant on Civil and Political Rights" or "ICCPR"].

[65] *The Constitution of Japan*, *supra* n. 52, Article 21.

[66] The character of the Japanese freedom of expression has been discussed by different academics. See generally Krotoszynski, R. J., *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech*, New York, New York University Press, 2006; Beer, L. W., "Freedom of Expression: the Continuing Revolution", *53 Law & Contemporary Problems 39* (1990); Youm, K. H., "Libel Laws and Freedom of the Press: South Korea and Japan Reexamined", 8 *Boston University International Law Journal* 53, 1990; Ouchi, Kazuomi, "Defamation and Constitutional Freedoms in Japan", 11 *American Journal of Comparative Law* 74, 1965.

which crystalizes certain rights not expressly enshrined in the Constitution. In this case, infra-constitutional norms could be more protective than the Constitution. In a different situation, a specific treaty could arguably provide a less extensively list of civil and political rights than the Japanese Constitution.

Consequently, scholars in Japan commonly turn to the question of hierarchy of human rights treaties or the content of their provisions to give an answer to conflicts between treaties and domestic laws. However, the legal *status* of infra-constitutional norms, human rights treaties and the Constitution are formal elements which are not intrinsically connected to the purpose and objective of human rights. In other words, human rights exist to protect the human person by recognizing basic rights and duties which belong to the human personality.[67] Scholars normally address the question of treaties and domestic law based on the perspective of hierarchical level or speciality of their provisions. However, this a technical approach not connected to the object and purpose of human rights. International human rights law as *lexis specialis* of general international law requires a different approach on treaties. Furthermore, the Constitution of Japan places weight on the protection of the human person regardless of the hierarchy of norms. Accordingly, we focus on the *pro homine* theory as the best approach that meets the underpinnings of both international human rights and Japanese constitutional law.

IV. The *Pro Homine* Principle

States are commonly envisaged as the traditional subjects of international law.[68] Notwithstanding the prominence of States, international law, especially after the Second World War, arguably developed under a paradigm rooted in the notion that individuals are bearers of rights and duties and with some capacity at the international level. This is especially true in the

[67] See *Universal Declaration of Human Rights*, *supra* n. 7, preamble; *American Convention on Human Rights*, *supra* n. 8, preamble; and *International Covenant on Civil and Political Rights*, 19 December 1966, 999 *United Nations Treaty Series* 171, preamble [hereinafter "International Covenant on Civil and Political Rights" or "ICCPR"].

[68] Mazzuoli, *Curso, supra* n. 26, p. 433.

subarea of international human rights law, which is ultimately concerned with the protection and the well-being of the human person.[69]

In our view, individuals are indeed one of the main elements of international human rights law.[70] Theories that deny this international legal personality of the human person are not in accordance with the development of international law, especially after the Second World War.[71] Moreover, the acknowledgment of the individual legal personality impacts not only the definition of its subjects, but also the evolution, interpretation and underpinnings of the law of nations in general.[72]

A less State-focused international law arguably influenced the elaboration of the Vienna Convention on the Law of Treaties, which does not have an explicit provision establishing a State sovereignty oriented interpretation. Rather, it accepts, among other methods of interpretation, a teleological approach by mentioning that the purpose and objective of a treaty should guide its interpretation.[73] Thus, international courts can decide cases by stretching or restricting the scope of a treaty provision in a conservative[74] or in an extensive individual-centered approach[75] based on how they understand the meaning of the terms "purpose and objective" of a treaty.

[69] See generally Cançado Trindade, A. A., *Access of Individuals to International Justice*, New York, Oxford University Press, 2011 [Cançado Trindade, *Access*].

[70] See Meron, T., *The Humanization of International Law*, Leiden, Martinus Nijhoff Publishers, 2006.

[71] See Cançado Trindade, A. A., *International Law for Humankind*, The Hague Academy of International Law, Martinus Nijhoff, 2010, p. 225 [Cançado Trindade, *Humankind*].

[72] See Cançado Trindade, *Access*, *supra* n. 69, pp. 3-6.

[73] *Vienna Convention on the Law of Treaties*, *supra* n. 1, Articles 30 and 31. See M. S. McDougal, "The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*", 61 *American Journal of International Law* (1967), pp. 993-994; see also M. Bos, "Theory and Practice of Treaty Interpretation", *Netherland International Law Review*, in S. Davidson (ed.), *The Law of Treaties* (Burlington, Ashgate Publishing 2004); and I. McTaggart, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press 1984).

[74] See generally ICJ (Advisory Opinion) 30 March 1950, *Interpretation of the Peace Treaties*; and ICJ (Judgment) 18 December 1951, *Fisheries (United Kingdom* v. *Norway)*.

[75] See generally Letsas, G., *A Theory of Interpretation of the European Convention on Human Rights*, New York, Oxford University Press, 2007; Pasqualucci, J. M., "The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law", 26 *University of Miami Inter-American Law Review*, 1995, pp. 12-16; Pasqualucci, J. M., *The Practice and Procedure of the Inter-American Court of Human Rights*, New York, Cambridge University Press, 2003; and Shelton, Dinah, *Remedies in International Human Rights Law*, New York, Cambridge University Press, 2005.

Notwithstanding the diverse number of theories regarding treaty interpretation and application,[76] we believe that States and the international society in general have implicitly and explicitly recognized that individuals have rights and duties at the international level. Moreover, they have direct or indirect international access to human rights courts.[77] Thus, the purpose of human rights treaties is the protection of the human person, which is connected to the individual legal personality. Arguably, the real consent of States in human rights is to create a *pro homine corpus juris*, that is, legal system prioritizing the human person as a *subject* of public international law.

This reasoning was arguably accepted and advanced by the European and the Inter-American Courts of Human Rights. Due to chronological aspects —Europe created a human rights treaty and court before the American continent—,[78] this framework was first adopted by the European Court of Human Rights. In the case of *Tyler* v. *the United Kingdom*, for example, the European Court decided that its human rights convention "is a living instrument which… must be interpreted in the light of present-day conditions".[79] In its jurisprudence, the European Court has emphasized the Convention's special character as an instrument of European public order

[76] See generally Fitzmaurice, G. G., "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points", 28 *British Yearbook of International Law*, 1951; Hogg, J. F., "The International Court: Rules of Treaty Interpretation II", 44 *Minnesota Law Review*, 1959; H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law*, 1949; Ris, M., "Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties", 14 *Boston College International & Comparative Law Review*, 1991; G. Schwarzenberger, "Myths and Realities of Treaty Interpretation", 9 *Virginia Journal of International Law*, 1968; Sfaer, A. D., "Treaty Interpretation: A Comment", *137 University of Pennsylvania Law Review*, 1989; I. Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities", 12 *Michigan Journal of International Law*, 1990; Waibel, M., "Demystifying the Art of Interpretation", 22 *European Journal of International* Law, 2011; Gardiner, R. K., *Treaty Interpretation*, New York, Oxford University Press, 2008.

[77] Cançado Trindade, "The Consolidation of the Procedural Capacity of Individuals in the Evolution of International Protection of Human Rights: Present State and Perspectives at the Turn of the Century", 30 *Columbia Human Rights Law Review*, 1998, pp. 19-20.

[78] See generally Buergenthal, T., "The American and European Conventions on Human Rights: Similarities and Differences", 30 *American University Law Review*, 1981.

[79] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyler* v. *United Kingdom*, para. 31. See also Jacobs & White, *The European Convention on Human Rights* (New York, Oxford University Press 2006) pp. 40-41.

(*ordre public*) for the protection of individual human beings that must be interpreted and applied so as to make its safeguards practical and effective.[80] Based on this line of thought, Jacobs argues that "any general presumption that treaty obligations should be interpreted restrictively since they derogate from the sovereignty of States is not applicable to the Human Rights Convention".[81] This position was arguably adopted by the European Court in *Loizidou* v. *Turkey* when the Court affirmed that "the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective" and added that substantive or territorial restrictions would "seriously weaken" the role of the European Court and "would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)".[82] This position that the European Convention is a living instrument which requires dynamic interpretation[83] is still part of the reasoning of the European Court. In the case of *Rantsev* v. *Cyprus and Russia* of 2010, the Court decided that, based on the rules set by the Vienna Convention on the Law of Treaties, the object and purpose of the European Convention is the effective protection of individual human rights.[84]

Arguably influenced by the European Court of Human Rights,[85] the Inter-American Court of Human Rights went even further in crystalizing an individual-centered interpretation and application in international law of human rights. Calling it the *pro homine* principle, the Inter-American Court has, for example, acknowledged that States cannot breach a person's project of life without international consequences;[86] that indigenous com-

[80] See Wildhaber, L., "The European Convention on Human Rights and International Law", 56 *International and Comparative Law Quarterly*, 2007.

[81] Jacobs, F. G., *The European Convention on Human Rights*, London, Oxford University Press, 1975, p. 17.

[82] ECtHR (Judgment) 23 March 1995, Case No. 15318/89, *Loizidou* v. *Turkey*, paras. 72 and 75.

[83] See ECtHR (Judgment) 21 February 1975, Case No. 4451/70, *Case of Golder* v. *The United Kingdom*.

[84] ECtHR (Judgment) 7 January 2010, Case No. 25965/04, *Rantsev* v. *Cyprus and Russia*, especially paras. 273-275.

[85] Killiander, M., "Interpreting Regional Human Rights Treaties", 13 *SUR - International Journal on Human Rights* (2010).

[86] IACtHR (Judgment) 17th September 1997, *Loayza-Tamayo Case* v. *Peru*.

munities have special rights to their lands;[87] that the Inter-American Court can take into consideration indigenous legal tradition;[88] and that there is an international prohibition of forced disappearances.[89] Furthermore, Judge Sergio García Ramírez of the Inter-American Court of Human Rights asserted that:

> When exercising its contentious jurisdiction, the Inter-American Court is duty-bound to observe the provisions of the American Convention, to interpret them in accordance with the rules that the Convention itself sets forth and those that can be applied under the legal regime governing international treaties, as set forth in the Vienna Convention on the Law of Treaties, of May 23, 1969. It must also heed the principle of interpretation that requires that the object and purpose of the treaties be considered (article 31(1) of the Vienna Convention), referenced below, and the principle *pro homine* of the international law of human rights – frequently cited in this Court's case-law which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement.[90]

All of these previously mentioned judgements advanced the protection of human rights beyond the initial set of rights spelled out by the American Convention in order to meet social needs and aspirations, and to better protect human dignity taking into account the individual legal personality, the existence of individuals-States dichotomy in human rights, the concept of human rights, and the role of human rights as part of international law. Thus, the Inter-American Court, in an interpretation prioritizing individuals or *pro homine*, was able to make reference to different treaties and decide cases that escaped the traditional scope of the American Convention and originally belonged to international humanitarian law, environmental law, indigenous protection, investors' rights and economic, social and cul-

[87] *Mayagna (Sumo) Awas Tingni* v. *Nicaragua*, *supra* n. 32.

[88] IACtHR (Reparations and Costs) 10 September 1993, *Aloeboetoe et al case* v. *Suriname*, *supra* note 32.

[89] *"Street Children" Case Villagrán-Morales et al*, *supra* n. 32.

[90] García Ramirez, S., "Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gomez and A. Abreu Burelli", 19 *Arizona Journal of International and Comparative Law*, 2002, para. 6 [emphasis added].

tural rights.[91] The Inter-American Court recognizes that international human rights is part of general international law, but is *lex specialis*, that is, forms a special set of laws, and, consequently, may prevail when in conflict with general international law whenever its provisions are *more favourable* to the right bearers on a specific case.[92]

Cançado Trindade argues that human rights treaties are endowed with a special nature as they go beyond the regulation of State interests and require an effective protection of guaranteed rights focusing on the human person.[93] Indeed, we agree with the South American scholar that human rights treaties are *sui generis*, that is, they have unique characteristics due to the fact that they set *erga omnes* obligations to the whole international society.[94] Consequently, human rights treaties cannot be developed, interpreted, or applied without taking into consideration their special nature as instruments which protect individuals and establish obligations to the entire international society. Consequently, the *pro homine* principle sets parameters to interpret and apply human rights norms crystalizing a true international public order which prioritizes the human person.[95]

[91] See Lixinski, L., "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law", 21 *European Journal of International Law*, 2010, p. 603.

[92] *Idem.*

[93] See Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* [Treatise of International Law of Human Rights] (Porto Alegre, Sergio Fabris 1997), especially Chapter XI.

[94] Cançado Trindade argues that international law undergoes a "humanization" system based on an individual-centred interpretation and application of treaty rights. Human rights treaties are endowed with a special evolutive nature —distinguished from multilateral treaties of the traditional type— that is a normative character of public order which establishes four requirements. First, treaty terms are to be autonomously interpreted. Second, in treaty application, one ought to ensure an effective protection of the guaranteed rights (effectiveness). Third, obligations enshrined in these treaties have an objective character and must be duly complied by States. Finally, permissible restrictions (limitations and derogations) to the exercise of rights are restrictively interpreted. See Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights", 2 *Journal of International Criminal Justice*, 2004, pp. 309-310.

[95] See IACtHR (Advisory Opinion) OC-16/99, 1 October 1999, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law,*; IACtHR (Merits, Reparations and Costs) 31 August 2004, *Ricardo Canese Case* v. *Paraguay*, para. 181; IACtHR (Preliminary Objections, Merits, Reparations and Costs) 2 July 2004, *Herrera-Ulloa Case* v. *Costa Rica*, para. 184; and IACtHR (Merits, Reparations and Costs) 2 February 2001,

Extending an argument established by the European Court of Human Rights, the Inter-American Court decision in *Yakye Indigenous Community* held that Article 29 of the American Convention and the Vienna Convention of the Law of Treaties —which provides that treaties must be interpreted taking into account their objective and purpose— extended the understanding of the general right to property[96] to include the notion of communal property of indigenous peoples, comprising the preservation of their cultural identity and its transmission to future generations.[97] Referring to the *pro homine* principle, the Inter-American Court decided that human rights treaties are living instruments, whose interpretation must go hand in hand with the evolution of times and of current living conditions.[98] To this regional Court, this individual-centered interpretation is consistent with the general rules of interpretation embodied in Article 29 of the American Convention, as well as those set forth in the Vienna Convention on the Law of Treaties.[99]

The American Convention's draftsmen cared to include Article 29 which expressly discarded an interpretation that could limit the enjoyment and exercise of the protected rights under this treaty or under the domestic law of State parties, or other international human rights instrument.[100] This provision crystalizes the *pro homine* interpretation, that is, protected rights must be interpreted extensively and restriction to rights must be interpreted restrictively.[101]

Baena-Ricardo et al v. *Panama*. See also Coto, L., "Los Principios Juridicos en la Convencion Americana de Derechos Humanos y su Aplicacíon en los Casos Peruanos" [The Legal Principles of the American Convention on Human Rights and its Application in the Peruvian Cases], *principios-juridicos.tripod.com/*. Accessed on 12 December 2013.

96 *American Convention on Human Rights*, *supra* n. 9, Article 21.

97 *Yakye Indigenous Community Case, supra* n. 32, paras. 124 and 126.

98 *Idem*.

99 *Idem*.

100 See Cançado Trindade, "Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century", 8 *Tulane Journal of International & Comparative Law*, 2000, p. 12.

101 Article 29 provides that no provision could be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State party or by virtue of another convention to which one of the said States is a party". See *American Convention on Human Rights*, *supra* n. 9, Article 29.

This framework goes beyond the text of the American Convention. International human rights law has a *pro homine* nature which is connected to the object and purpose of human rights treaties.[102] Accordingly, the framework of any human rights analysis is the *pro homine* principle of international human rights law. Furthermore, there is an indissoluble nexus between the *pro homine* and the object and purpose principles. That is to say, this teleological interpretation has a special preponderance in human rights because they address the human person.[103] A solely textual interpretation would fail to consider the object and purpose of human rights treaties.[104]

Thus, the *pro homine* principle, which is a hermeneutic criterion that shapes all human rights law, is found not only in the American Convention, but in international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[105] Article 5 of the ICCPR, for example, spells out that "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant".[106]

Furthermore, International Convention on the Elimination of All Forms of Racial Discrimination, adopting a similar provision, States that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality".[107]

[102] Montalvo, A. E., "Reservations to the American Convention on Human Rights: A New Approach", 16 *American University International Law Review*, 2001, p. 290.

[103] Salvioli, F., "Un análisis desde el principio pro persona sobre el valor jurídico de las decisiones de la Comisión Interamericana de Derechos Humanos" [An Analysis of the Legal Value of the Decisions of the Inter-American Commission on Human Rights from the Pro Persona Principle], in *En Defensa de la Constitución: Libro Homenaje a Germán Bidart Campos* [Defending the Constitution: Book in Honor to German Bidart Campos], 2003, pp. 8-9.

[104] *Idem*.

[105] Gonenc & Esen, *supra* n. 31. See also *International Covenant on Civil and Political Rights*, *supra* n. 64; and *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 United Nations Treaty Series.

[106] *International Covenant on Civil and Political Rights*, *supra* n. 64, Article 5.

[107] *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 United Nations Treaty Series 195, Article 1 (3).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on that same principle, spells out that Article 1 is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".[108] Furthermore, its Article 16 adds that the "provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion".[109]

The *pro homine* principle seeks to elucidate the case of conflicts between norms and set a pathway for the interpretation and application human rights by crystalizing the human person as the purpose and goal of law. Individuals, as bearers of rights and duties, are the ultimate addressees of human rights norms.[110] Consequently, human rights norms, regardless if international or municipal, are envisaged to protect individuals by conferring them rights. Thus, the *pro homine* principle recognizes this preponderance of the human person by setting three interpretative rules. First, human rights norms must, as a rule, be extensively interpreted when applying human rights and, conversely, must be restrictively interpreted when limiting protected rights. Second, in case of doubt or conflict between different human rights norms, the most protective norm to the human person must be adopted. Finally, in the municipal law, conflicts between domestic laws and international agreements are guided not by hierarchy or speciality rules, but rather by the norm which best protects the human person in that specific situation.[111]

The international and domestic human rights systems follow the same theoretical criteria, which are centered on the human person, as the final

[108] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 United Nations Treaty Series 85, Article 1.

[109] *Ibid*em, Article 16.

[110] See Cançado Trindade, *Humankind*, *supra* n. 71.

[111] See Gonenc & Esen, *supra* n. 31, p. 494. Furthermore, the *pro homine* principle finds support in a number of municipal law principles as, for example, the *favor debitoris* (in favor of the debtor), *in dubio pro reo* (in case of doubt, favor the accused), and the *in dubio pro operario* (in case of doubt, favor the employee). See H. Henderson, "Los Tratados Internacionales de Derechos Humanos en el Orden Interna: La Importancia del Principio *Pro Homine*" [International Human Rights Treaties in Domestic Law: the Importance of the *Pro Homin*e Principle], 39 *Revista IIDH*, pp. 91-92.

addressees of rights. Consequently, this same *pro homine* rule arguably applies domestically. It is, thus, possible to conclude that Brazilian constitutional law allows the application of a dialogical monism.[112] Indeed, the traditional monist theory is not suited to explain the underpinnings of international human rights treaties and domestic law in general, including constitutional law.[113] In monist States, both international and domestic instruments —if they are legally in force— can be equally applied by municipal judges.[114] However, this *pro homine* approach flows from international human rights treaties themselves.[115] In other words, in a specific practical situation, a judge will have an array of instruments dealing with a certain situation and can, thus, choose and apply the instrument, based on the circumstances of this case, which most protects the human person.

In our view, this *pro homine* principle flows from the underpinnings of human rights, which is connected to individuals as their final addressees. If individuals are the ultimate bearers of human rights and their main source of preoccupation, human rights instruments must be interpreted and applied based on the most favourable approach to the human person. This is a logical conclusion. Human rights are basic individuals' rights, that is, basic rights which belong to humans only in virtue of being human.[116] Accordingly, human rights are rooted on and exist for the human person. The *pro homine* principle simply acknowledges this essential particularity of domestic and international human rights.

Although the *pro homine* principle is intrinsically connected to international human rights law, it can also be part of domestic systems.[117] In Mexico, for example, with an amendment from 2011, the *pro homine* principle is expressly mentioned in body the Constitution becoming a necessary ele-

[112] Article 5(2) of the Brazilian Constitution is clear example of "communication vessels" between international law and municipal law, informs that rights enshrined in this instrument do not exclude human rights treaties. See V. Mazzuoli, *Tratados Internacionais de Direitos Humanos e Direito Interno* [International Human Rights Treaties and Domestic Law], São Paulo, Saraiva, 2010, p. 119 [Mazzuoli, *Direito Interno*].

[113] Mazzuoli, *Curso*, *supra* n. 26, p. 102.

[114] *Ibidem*, p. 103.

[115] *Ibidem*, pp. 289-290.

[116] J. Donnelly, *The Concept of Human Rights* (London, Routledge 1989) p. 1. See also J. Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca, Cornell University Press, 1989, p. 12.

[117] Mazzuoli, *Law of Treaties*, *supra* n. 20, pp. 389-416.

ment of legal hermeneutics in human rights.[118] The domestic application of the *pro homine* principle, in our view, can be not only in virtue of the domestic legislation but also due to the underpinnings of human rights. When a State ratifies and accepts international human rights instruments, there is a legal presumption and, in fact, a legal obligation, that this State will indeed carry out the treaty obligations. The ultimate obligation crystalized in human rights treaties is that States will safeguard certain basic rights enshrined in this international instrument even if this protection means that the State will not apply the treaty but another provision which better protects the human person in that specific situation. Thus, we believe that enshrined in every human right's treaty there is the obligation that States must safeguard protected rights even if this means the non-application of the treaty in detriment of a domestic legislation.

Accordingly, when States ratify international human rights treaties they accept the intrinsic *pro homine* approach part of human rights consolidating a dialogical monism.[119] There are, thus, three distinct systems concerning conflicts between domestic law and international law: dualistic, monist and dialogical. This dialogical is the consequence of the *pro homine* principle which does not exclude any human rights norms or places them in a strict hierarchical system. Rather, it establishes that international and municipal norms would coexist in a same system without the need to transform an international norm into domestic legislation. Consequently, this system, in contrast to the traditional monism, allows "communications" between municipal and international norms at both, domestic and international

[118] Urquiaga, X. M., "Metodología para la enseñanza de la reforma constitucional en materia de derechos humanos: principio pro persona" [Methodology for the Education on the Constitutional Amendment on Human Rights: The Pro Persona Principle], Mexico, Suprema Corte de Justicia de la Nación, 2011, *http://scjn.gob.mx/red/coordinacion/archivos_Principio%20pro%20persona.pdf*. Accessed on 25 August 2014; K. Castilla, "El Principio Pro Persona en la Administración de Justicia" [The Pro Persona Principle in the Management of Justice], *Revista Mexicana de Derecho Constitucional* (2011), *http://juridicas.unam.mx/publica/rev/cconst/cont/20/ard/ard2.htm*. Accessed on 25 August 2014.

[119] This approach is arguably increasingly part of the common law systems as well. Melissa Waters affirms that "common law courts are abandoning their traditional dualist orientation and are beginning to utilize unincorporated human rights treaties in their work despite the absence of legislation giving domestic legal effect to the treaties". See Waters, M. A., "Creeping Monism: the Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties", 107 *Columbia Law Review*, 2007, p. 633.

levels.[120] States commonly adopt exclusionary systems, that is, one should consider one norm and municipal or international law should prevail as a general rule. However, in the *pro homine* approach, the focus on the human person replaces the exclusionary view by a complementary system.[121]

This *pro homine* approach is a general principle of international human rights law which is codified in human rights treaties. Although the decision on the interaction between international law and municipal law is a domestic issue, this international codification of the *pro homine* principle places an extra burgeon on States to adapt their domestic approaches and develop towards a dialogical system. In other words, within a human rights system, States should not completely exclude the application of any norm. Differently, they should consider the well-being of the human person. In our view, Japanese lawyers should, thus, by virtue of Article 98(2) of the Constitution, officially recognize the *pro homine* approach as the hermeneutical standard in interpreting and applying human rights norms.

V. Feasibility of the *Pro Homine* principle in Japanese law

As previously mentioned, Japan is a monist State. As a democratic State with a strong commitment to human rights, it deals with the question of reception and *status* of human rights treaties. Furthermore, Japan seeks to fully comply with its international obligations balancing them with its cultural, historical and constitutional backgrounds.

In our view, the monist theory is advantageous to States and to the protection of human rights. From a State perspective, the adoption of monism excludes the necessity of creating a new domestic legislation which would accelerate the domestic application of a treaty and show to the international society that this State is indeed committed to its international agreements. From a human rights perspective, the monist theory is also the most suitable approach. Human rights treaties address individuals' rights. It is

[120] Mazzuoli, *Direito Interno*, *supra* n. 112, p. 119. See also V. Mazzuoli, "Dialogical", *supra* n. 3.

[121] See below for the example in the Japanese system. For an example of this approach in Mexico, see Urquiaga, *supra* n. 118.

not necessary to "transform" an international treaty into a domestic statute if the human person already possesses these treaty rights based on international law. Monism is, in our view, the theory which better fits the modern international human rights system. It already requires an acknowledgment of both the Executive and the Legislative Powers during the process of treaty ratification.[122] There is, thus, no necessity to further request the legislative power to provide new domestic legislation addressing the topics of the recently adopted treaty.

However, Japan, as any democratic State, faces the question of which monist theory would better reflect its constitutional context and international commitments. Japan's Constitution, following the modern approach, organizes the legal and political structures of the nation and establishes a core set of fundamental rights and freedoms limiting State power and granting basic rights to all individuals.[123] One of the main objectives of the Japanese Constitution is, therefore, to protect a core set of inalienable and inviolable rights. Consequently, from a domestic and constitutional perspective, human rights treaties strengthen and broaden the individual protection helping to shape Japan's municipal law.

In our view, the *pro homine* principle, which grounds a dialogical monism, provides a framework that is in accordance with Japan's constitutional and international values and, furthermore, better protects the human person in case of human rights violations. The dialogical monism acknowledges a "dialogue of sources"[124] by which judges can select a norm, domestic or international, that better protects the human person in the light of a specific situation. In our view, this dialogical monism is a requirement of the underpinnings of international human rights law itself. This *lex specialis* of international law is centered on the human person as the source and end of law. The objective and purpose of international human rights law is the protection of the human being. Accordingly, the *pro homine* principle provides a way to achieve the best protection for individuals through the dialogue of sources.

[122] See generally Murphy, S. D., *Principles of International Law*, St. Paul, Thompson Reuters, 2012, p. 81. See also Mazzuoli, *Law of Treaties*, *supra* n. 20, p. 86.

[123] See Matsui, S., *The Constitution of Japan: A Contextual Analysis*, Portland, Hart, 2011, p. 4.

[124] See Jayme, E., "Identité Culturelle et Intégration: Le Droit International Privé Postmoderne", 251 *Recueil des Cours*, 1995, p. 259; and Mazzuoli, *Direito Interno*, *supra* n. 112, p. 119.

Furthermore, the Japanese Constitution is silent on the *status* of human rights treaties domestically and on the possibility of the concomitant application of municipal and international norms. However, the Constitution is not silent on the protection of the human person.[125] In a teleological perspective, the Constitution's objective, in its human rights section, is to better protect the human person. This is also the case of the Brazilian Constitution of 1988 which places the "prevalence of human rights" among one of the Republic's governing principles as part of its international relations (Article 4, II). Consequently, it implicitly accepts the *pro homine* principle, which is, thus, grounded on the "spirit" of the Japanese bill of rights.

In our view, there are, thus, two ways to apply the *pro homine* principle in the Japanese context. First, new legislation could, following the premises and rules set by the Constitution, regulate the *status* of human rights treaties domestically and determine how to solve conflicts between municipal law and human rights norms. Thus, this new statute could crystalize the *pro homine* principle as the main interpretative guide to protect human rights domestically. However, this new act might not be needed at all. A second way of applying the *pro homine* principle is by reference to the purpose and objective of international human rights norm and the Japanese Constitution, which is the protection of the human person based on the recognition of basic natural rights.

International treaties seek to acknowledge certain individuals' rights and place States under duty to domestically comply with these treaty norms. Since the main objective of human rights treaties is to increase the protection of the human person, it cannot further limit rights already enshrined domestically or in other international treaties. Human rights treaties, thus, implicitly acknowledges the *pro homine* principle based on a dialogue of sources. This flows from human rights system itself which is centered on the human person as its source and end.

The Japanese constitutional system arguably takes a similar approach to human rights.[126] Article 11 of the Constitution spells out that individuals must not "be prevented from enjoying any of the fundamental human rights".[127] This could arguably be interpreted to accommodate the teleo-

[125] Matsui, *supra* n. 123, pp. 154-155.

[126] *Idem.*

[127] *The Constitution of Japan, supra* n. 52, Article 11.

logical interpretation of the *pro homine* principle. Although the Constitution is concerned with its bill of rights, the main and ultimate purpose of human rights is the protection of the human person. This protection could be rooted on domestic or international norms. Thus, in our view, there is a room on the Japanese Constitution for the *pro homine* principle and its dialogue of sources.

VI. Conclusion

International law is integral to international relations. States and the international society as whole constantly interact with each other at the international plane through the conclusion of treaties, which commonly impact the States' domestic systems. Accordingly, the study of conflicts and the relation between treaties and domestic law is a central aspect of both municipal law and international law. However, scholars and jurists constantly fail to agree on a solution to conflicts between treaties and domestic laws. The lack of a common ground leads to different approaches which commonly range from the parity rule of dualism to the increasing acceptance of international monism.

However, in contrast to general international law which normally concerns State interests, human rights are focused on the human person as the main addressee of rights. In other words, the objective and purpose of human rights instruments is the best protection of the human person. The *pro homine* principle does not flow from treaty provisions, but rather is a basic underpinning element of human rights which is recognized in treaties. In other words, this basic principle is adopted and strengthened by human rights treaties. The *pro homine* is a *lex specialis* which sets international human rights law in a different perspective from general international law, that is, whilst general international law majorly focuses on State relations and interests, international human rights is concerned with the best protection of the human person as a subject of law at the international level.

The *pro homine* aspect of international law also encompasses domestic human rights, including the Japanese bill of rights. Japanese scholars argued that international human rights expand the domestic human rights system when treaties widen the umbrella of human rights protection. Con-

versely, international human rights treaties might require further reconciliation and harmonization when they limit the human rights norms crystalized in the Constitution of Japan.[128] Accordingly, Japanese scholars already take a "content-based" approach to the conflict of domestic laws and treaties —human rights can only be extended and not limited. The *pro homine* principle is, thus, a further recognition of the content-based approach to include the best protection of the human person as the main focus of human rights instruments.

Moreover, the Constitution of Japan adopts the extensive approach to human rights application and interpretation when its Article 11 spells out that the human person "shall not be prevented from enjoying any of the fundamental human rights"[129] and adds that "[t]hese fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights".[130] Arguably, although focusing on its bill of rights, the first part of Article 11 does not distinguish domestic law and international law when establishes that basic human rights are necessarily applicable to all human beings (individuals should not be prevented from enjoying "any fundamental human rights"). Consequently, this provision opens a "window" which works as "a communication vessel" similar to that of Article 29 of the American Convention on Human Rights[131] and Article 5 of the International Covenant on Civil and Political Rights.[132]

In a similar tone with international human rights treaties, Article 11 of the Japanese Constitution recognizes that human rights are inherently human and worthy of protection (recognition of inherent rights).[133] Further-

[128] See above.

[129] *The Constitution of Japan*, *supra* n. 52, Article 11.

[130] *Idem*.

[131] *American Convention on Human Rights*, *supra* n. 9, Article 29.

[132] *International Covenant on Civil and Political Rights*, *supra* n. 64, Article 5. Due to geographical limitations, Japan cannot be a member of neither the European Court of Human Rights nor the Inter-American Court of Human Rights. Furthermore, individual communication procedure under the International Covenant on Civil and Politcal Rights of the Human Rights Committee cannot be applied in Japan at this stage. See United Nations, United Nations Human Rights, *Ratification Status for CCPR-OP1 - Optional Protocol to the International Covenant on Civil and Political Rights*, *tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en*. Accessed 29 June 2014.

[133] Matsui, *supra* n. 123, p. 154.

more, it forbids restrictive interpretation of rights —limitation of rights must be restrictively interpreted— and it can be a guideline to analyze omissions in human rights norms. In other words, the Japanese Constitution itself, in accordance with the underpinnings of international human rights law, crystalizes a true *ordre public* or public order which prioritizes the human person setting the parameters to interpret and apply human rights norms. Consequently, following Article 11 of the Japanese Constitution, in case of doubt or omission, judges can apply domestic law or international law based on the best approach to the human being in the light of a specific case regardless of hierarchy.

There is, thus, no need for an additional norm establishing the *pro homine* principle as the main interpretative guide to human rights in Japan. Lawyers can claim that the Constitution itself acknowledges the *pro homine* aspect of human rights. However, in other to further crystalize an effective human rights system, an infra-constitutional statute, following this interpretative rule set by Article 11 of the Constitution, could mention the *pro homine* principle as one of the guidelines for the interpretation and application of human rights norms in Japan.

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